IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 45 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

GUJ. STATE FERTILIZERS CO. LTD.

Versus

HJ BAKER & BROS.

Appearance:

MR SN SHELAT for Petitioner

Mr.SH SANJANWALA for MR AR MAJMUDAR for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 12/11/98

J U D G E M E N T

1. This revision under Section 115 of the Code of Civil Procedure has been filed by the Gujarat State Fertilizers Co. Ltd. against the order of the Court

below dismissing an Application for interim injunction during the pendency of the Arbitration proceeding restraining the respondent No.1 from proceeding with the Arbitration proceeding.

2. The facts giving rise to this revision are as under :

The revisionist filed an application under Section 33 of the Arbitration Act for a declaration that there existed no arbitration Agreement between the parties. The parties had already referred their dispute to the Arbitrator. The Arbitrator entered upon the reference when Application under Section 33 of the Arbitration Act was moved by the revisionist. Another Application under Order 39, Rules 1 & 2 C.P.C. was filed for restraining the respondent No.1 from proceeding with arbitration proceeding.

3. The petitioner was in need of sulphur, hence invitation of tender for import of sulphur was floated on 14th July 1992. The respondent No.1 submitted its offer on 27th July 1992. According to the petitioner the offer was not strictly in accordance with the terms of invitation of tender. The offer of the respondent No.1 was accepted by the petitioner - revisionist with the statement that other terms and conditions stipulated in tender inquiry would be confirmed separately. According to the revisionist the counter offer submitted by the respondent No.1 was not accepted by the revisionist, hence there was no concluded contract between the parties. In the absence of concluded contract and also in absence of arbitration clause in writing the Arbitrator acquired no jurisdiction to proceed with the matter.

4. The stand of the respondent was that there was a concluded contract. The difference was only in respect to shipping terms and all other conditions in the tender were accepted by the respondent No.1. One of the conditions in the tender contained in clause (20) incorporated arbitration agreement and since this was accepted by the respondent No.1 there came into existence a valid written arbitration agreement. The dispute was entered upon by the Arbitrator with the consent of the parties who joined the reference. It was therefore pleaded that the Arbitrator had jurisdiction to enter upon reference and no injunction could be granted.

5. Application for interim injunction was rejected by the Court below. Hence this revision.

6. Shri S.N.Shelatl, learned Additional Advocate General for the revisionist and Shri S.H.Sanjanwala, learned Advocate for the respondent were heard at length.

7. An objection was taken by the learned Counsel for the respondent that the revisionist has not taken any case before the trial Court, that there is no concluded contract between the parties. It was also contended that the petitioner did not raise any plea before the trial court that though there is concluded contract between the parties there is no arbitration agreement between them regarding arbitration clause and as such these points which have been argued in this revision are beyond the scope of revisional jurisdiction under Section 115 C.P.C. I do not find much force in this objection. As mentioned earlier the two applications, one under Section 33 of the Arbitration Act and another under order : 39, Rule 1 & 2 C.P.C. were moved by the revisionist and proper reading of these applications would reveal that existence of the contract was challenged so also the existence of Arbitration Agreement. Since this objection was raised by the learned Counsel for the respondent after conclusion of argument of Shri Shelat, I do not propose to dismiss this revision on this technical ground.

8. The order of the trial Court has been examined. Only two points arise for determination in this revision. The first is whether prima facie there was concluded contract between the parties and the second is whether there is written arbitration Agreement between the parties.

9. As a matter of fact on these two points the findings recorded by the trial Court are in favour of the respondent. These findings cannot be lightly disturbed in this revision unless it is found that from the material on record no reasonable man could have taken such view and that the view taken by the trial Court on the two points is prima facie perverse or illegal.

10. So far as the question of concluded contract between the parties is concerned, number of documents were referred to by Mr.Shelat and also by the learned Counsel for the respondent. A plain reading of these documents would definitely give an indication that there was prima facie concluded contract between the parties. There can be no dispute that for every contract there should not be written agreement. The contract can be entered into even by correspondence and also by telephonic talk. The only requirement is that there

should be an offer by one party who is called the proposer and the offer should be accepted by the other party who is called the acceptor. Once there is acceptance of the offer the contract comes into existence. The contract can be inferred even from the correspondence. In the case in hand the contract came into existence through tender notice. The tender is nothing, but invitation to offer. In response to such tender offer was made by the respondent No.1. The offer was accepted with certain modifications by the revisionist. It is very difficult to accept at this stage that there was no concluded contract. The revisionist opened irrevocable letter of credit on 13.11.1992 in favour of respondent No.1 for discharging its obligation under the contract for which Page No.110 of the Paper Book can be referred. Secondly the revisionist invoked condition No.19 of Annexure : A of invitation to offer quoting changed circumstances and severe constraint for requesting the respondent No.1 to cancel the shipment of sulphur schedule for middle of November, 192 (vide page : 108 of the paper book). Thus, having invoked force majeure clause, which can only be invoked when there is a concluded contract, the petitioner cannot contend that there was no concluded contract between the parties for purchase and sale of sulphur. Further Page No.125 indicates that vide letter dated 5.11.1993 the revisionist, for the reasons given in the telex dated 23.11.1992 repudiated the contract. This repudiation of the contract was at the instance of the revisionist. If there was no concluded contract, there was no occasion for the revisionist to repudiate the contract. Further, in terms of clause (20) contained in the tender the parties jointly referred the difference and disputes to the Arbitrator. On these facts and circumstances of the case it is difficult to accept the contention of Shri Shelat that there was no concluded contract between the parties. I am unable to accept the contention of Mr.Shelat that the counter offer of the respondent demolished the entire theory of concluded contract. From the documents on record it transpires that there was no counter offer, rather negotiations were going on between the parties regarding certain terms and those terms were essentially relating to shipping terms. Other terms and conditions were already accepted by the revisionist. There is no merit in the contention of Mr.Shelat that the petitioner being joint sector public undertaking there cannot be any concluded contract which has not been signed by authorised officer under Articles of Agreement. Since the revisionist chose to enter into contract by floating tender inviting offer it cannot be permitted to say that there was no concluded contract

between the parties. Thus on this point no interference in the findings of the trial Court is called for.

11. The second point for consideration is whether there existed Arbitration Agreement between the parties. Clause (20) of the tender notice (Annexure : A) (Page : 70) reads as under :

"Arbitration :

In the event of any question or dispute arising under the contract, the matter in dispute shall be referred to two arbitrators, one to be nominated by the Sellers and one to be nominated by the buyers or in case of the said Arbitrator not agreeing, then to an Umpire to be appointed by the arbitrators in writing before proceeding on the reference and the decision of the Arbitrators/Umpire shall be final and conclusive. The venue of the arbitration shall be New Delhi."

According to Shri Shelat, of course it was a clause in the tender notice but it was not written in the Agreement between the parties. The respondent has never accepted terms and conditions of the tender to make it a concluded contract with both the sides. The learned Counsel for the respondent on the other hand contended that tender notice was accepted, which was submitted by the respondent No.1, which includes Clause 20 of the tender notice which contains arbitration clause. The negotiation took place regarding shipping terms with modifications which were being considered by both the parties. It was also contended that throughout there was no dispute between the parties regarding applicability of the general terms and conditions as contained in clause (20) of the tender notice. The parties subsequently negotiated certain additional terms and conditions including shipping terms and conditions.

12. Section 2(a) of the Arbitration Act defines Arbitration agreement to mean a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. This section was interpreted by the Apex Court in J.K.Jain & ors. V/s. Delhi Development Authority, reported in JT 1995 (7) S.C. 409. The Apex Court observed that according to Section 2(a) of the Arbitration Act, Arbitration agreement means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. But when Section 2(a) while defining "arbitration agreement" speaks about

a written agreement to submit present or future differences to the arbitration, it is not necessary that it should also be signed by the parties like any formal agreement relating to a contract." It further observed that to constitute "an arbitration agreement" it is not necessary that there should be a formal agreement or that the terms should all be contained in one document. All that is necessary is that from documents it must appear that the parties had agreed to submit present or future differences to arbitration.

13. Thus, from the above dictum of the Apex Court it is clear that an arbitration agreement must be in writing, but it need not be signed by the parties to the Agreement. It is further clear that formal agreement or that the terms should all be contained in one document, is not essential to create valid arbitration agreement. All that is necessary that from documents it must appear that the parties had agreed to submit present or future differences to arbitration. Consequently if the arbitration clause is contained in the tender notice which was accepted by the respondent No.1 there came into existence arbitration agreement within the meaning of Section 2(a) of the Arbitration Act.

14. In J.K.Jain's case (supra) it was found that there was no arbitration clause in agreement itself, but clause (14) of the tender form was found to implied reference of dispute to the arbitrator. Thus, the facts of J.K.Jain's case were identical to the facts of the present case before me and as such there should be no difficulty in holding that there was valid arbitration agreement between the parties.

15. On similar facts the Apex Court in Fair Engineers Pvt. Ltd. and another v/s. N.K.Modi, reported in (1996) 6 SCC 385 held that the offer and counter offer became an integral part of the contract and thereby the arbitration clause contained in condition also became integral part of the contract. The Apex Court on these facts held that there existed arbitration agreement in contract. It was further laid down that on acceptance of counter offer relating only to technical details of offer, the other terms and clauses of the document such as arbitration clause must also be deemed to have been accepted.

16. In view of the aforesaid decision arbitration clause contained in the tender notice cannot be looked in isolation nor it could be said that there existed no arbitration agreement between the parties.

17. Since the respondent No.1 by submitting its tender accepted condition No.20 of the tender notice which is arbitration clause and since at no stage the respondent No.1 disputed condition No.20 or disclosed contrary intention, it can hardly be said that there was no agreement between the parties. Subsequent negotiations between the parties were with reference to such other terms and conditions which were not accepted. In the telex message of acceptance issued by the petitioner it was reiterated that other terms and conditions generally as stipulated in the tender inquiry shall apply vide Page No. : 83. The respondent No.1 at no stage disputed or conveyed its non-acceptance of other terms and conditions specifically stipulated in the tender inquiry.

Similar situation is found from the telex message from Pages : 88 to 90 of the paper book.

18. The case of U.P.Rajkiya Nirman Nigam Ltd. v/s. Indure Pvt. Ltd. & ors., reported in J.T. 1996 (2) SC 322 cited by Shri Shelat on facts of the case before me cannot be applied with full force. In this case it was laid down that Section 2(a) of the Arbitration Act envisages written agreement which is a pre condition for reference to arbitrators and since there was no concluded contract there existed no arbitration agreement for reference to the arbitrator. On facts I have observed earlier that prima facie there was concluded contract which was repudiated by the petitioner. There was also arbitration clause in the tender notice which was accepted by the respondent No.1. Thus, there is prima facie arbitration agreement also and as such reference by the party cannot be said to be illegal and nor it can be said that the arbitrator has no power or jurisdiction to proceed with the reference. The trial Court has also prima facie considered the question of existence and validity of the arbitration agreement. Consequently the Arbitrator cannot be said to have sole jurisdiction and power to decide the question of existence or validity of the arbitration agreement. Since the Civil Court has already undergone this exercise the jurisdiction of the arbitrator is hardly curtailed or ousted.

19. The case of M/s. Gangaram Ratanlal v/s. M/s. Simplex Mills Co. Ltd., reported in AIR 1982 Bombay 72 lays down a general principle of law that if the arbitrator has no jurisdiction for want of written arbitration agreement by mere acquiescence on the part of the party and any admission of liability by such party

before the arbitrator can avail the other side nothing as it is made before an authority, who, for want of an arbitration agreement, has no jurisdiction in the matter. On the contrary the facts before me are that there was a written arbitration agreement and as such there is no inherent lack of jurisdiction in the arbitrators to proceed with the matter. Accordingly the trial Court has not committed any jurisdictional error in refusing to grant injunction restraining the respondent No.1 from proceeding with the arbitration proceeding before the arbitrator.

20. I do not find any merit in this revision, which is hereby dismissed with no order as to costs.

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